THE GAGE OF LAND IN MEDIEVAL ENGLAND.

ECONOMIC and legal development in England is, in certain of its grand outlines, strikingly illustrated by the history of forms of security on property. One sees in England the gradual advance from a natural to a money and credit economy, the progress from the rural and agricultural life of Anglo-Saxon times to the town and national life, with its industry and its commerce, of the centuries that follow the coming of the Danes and the Normans. A heathen and tribal society gives way to Christian and to feudal institutions; and at the same time there is early developed a strong kingship, a strong central government, that is to influence in a masterful way the course of economic and legal history down to our own day. Acting as a check on the growth of local custom and of feudal justice, and making the towns subserve its own economic purposes, this powerful central government has its foreign and commercial policy and its system of Common Law and Equity, with the good right arm of judicial execution to enforce the decrees of its courts.

Unless we err, the English law of gage, like the law of other Germanic countries, starts from the conception, in the Anglo-Saxon days of barter and self-help, that the *wed* or *vadium* delivered to the gagee is a provisional satisfaction, a provisional payment, a redeemable forfeit. The *res* and the claim are regarded as equivalent; and, should the gagor not redeem, the gagee must look exclusively to the *res* for satisfaction. The gagee has no personal action against the gagor; and the gagor, should he fail to redeem the *res*, has no right to the surplus, if the *res* be worth more than the amount of the gagee's claim. This forfeit-idea is the original idea underlying the *wed*, and this conception persists. In course of time, with the development of credit and of judicial execution, of varieties of obligation and of forms of action for their enforcement, there branch off two other ideas: (1) the idea that a *res* of trifling value may be given as a binding contractual form,[1] and this at length develops in the English ecclesiastical courts into the

[1] *Cf.* Thayer, Evidence at the Common Law 393.

formal contract by pledge of faith; and (2) the idea that, if the *res* be of substantial value, it is merely a collateral security to a personal claim, the gagee being entitled to sue the gagor personally and the gagor having a right to call the gagee to account for the surplus.[1] Along with this transformation of the primitive forfeit notion into the idea of collateral security there is another line of development that must be most carefully distinguished therefrom. Inasmuch as the early gage transaction is merely a provisional payment, the property right of the gagee on default lacks the *Auflassung*, the quit-claim, the final abandonment of all right in the *res* that is in Germanic law necessary to a complete and absolute title. The gagee cures this defect by going into court and getting the court to declare his title absolute; and, later, by getting the gagor in advance to put a *resignatio*-clause in the deed itself. By such a clause, however, the gagee evades the obligation that the law has at length imposed upon him of returning the surplus; and the law enters and forbids this evasion.[2]

It lies beyond the scope of the present paper to prove, by a discussion of English texts, that this has been the course followed by our own law. Keeping in mind, however, the outlines of this general Germanic development, we wish merely to distinguish as clearly as possible the various forms assumed by the English medieval gage of land. A consideration of the many difficult questions connected with the law of securities on land, not only in its historical development, but also in its present-day application to concrete cases that come before the courts, will, it is believed, be rendered all the easier by such a preliminary survey, rapid and inadequate though it be.

It helps to make the various medieval forms stand out sharply, if we group them into gages with immediate possession of the creditor, and gages with possession of the debtor until default; and this is indeed but the fundamental distinction that underlies

[1] On *Schuld* and *Haftung* compare von Amira, Nordgermanisches Obligationenrecht (Altschwedisches Obligationenrecht [1882]) 22–42, and (Westnordisches Obligationenrecht [1895]) 56 *et seq.*; 2 Brinz, Pandekten (1879) 1 *et seq.* See also 1 Chironi, Trattato dei privilegi, delle ipoteche e del pegno (1894) 1 *et seq.*

[2] For the details of this view of the Germanic development in general, but without a consideration of the English texts, see 2 Heusler, Institutionen des deutschen Privatrechts 128–153, 225–250; Wigmore, The Pledge-Idea, 10 HARV. L. REV. 321–341 (citing, in his discussion of the historical significance of the "release" and "quit-claim," Professor Ames' essays on Disseisin, 3 HARV. L. REV. 23, 313, 327, unfortunately not accessible to the present writer during the preparation of this article). Compare also Wigmore, The Pledge-Idea, 11 HARV. L. REV. 29.

the *fiducia* or the *pignus* and the *hypotheca* of Roman law,[1] the *aeltere Satzung* and the *juengere Satzung* of German law,[2] the *engagement* and the *obligation* of French law.[3]

Then, looking at execution or the enforcement of the security, we may make several further distinctions. If we adopt for the moment — and it will tend to clearness — the terminology of German legal science, we may classify English forms of security on land with immediate possession of the creditor as usufruct-gage (*Nutzpfand*) and as property-gage (*Proprietaetspfand*). In forms of usufruct-gage the creditor has merely a right to take the rents and profits. In forms of property-gage the *res* itself, either by forfeiture or by sale, may be made to answer the claim of the creditor; if by forfeiture, whatever the value of the land may be, we may call the security a forfeiture-gage (*Verfallspfand*), and if by sale, with a return of the surplus proceeds to the debtor, the security may be designated as a sale-gage (*Verkaufspfand*). There may indeed be combinations of the usufruct-gage and the property-gage; and every property-gage with immediate possession of the creditor necessarily involves a temporary usufruct-gage, a right to take the rents and profits until the debtor's default.[4] Speaking now only for the English medieval law, we believe that gages where the debtor remains in possession until default may also be classified, according to this same principle, as usufruct-gage and as property-gage. In other words, whether the creditor take possession immediately or only on the debtor's default, what the debtor has in reality gaged are either the rents and profits of the land or the property, the *res*, itself. Finally, from these forms of security proper, where the creditor's claim may be satisfied, in one way or another, out of the gaged land, we may sharply distinguish cases where all the right the creditor has is to hold the land as a distress, as a *simplex namium*, as a means of bringing compulsion to bear on the debtor; for here the creditor has no right to take the fruits of the land and no right to obtain the land itself, either on the

---

[1] See 1 Dernburg, Pfandrecht 1–95.

[2] See von Meibom, Das deutsche Pfandrecht; Brunner, Grundzüge der deutschen Rechtsgeschichte 188–191.

[3] See Franken, Das französische Pfandrecht im Mittelalter 1–36; Viollet, Histoire du droit civil français (1893) 733–748.

[4] On the medieval law on the continent see especially Franken, Das französische Pfandrecht im Mittelalter 207, 208; and Brunner, Grundzüge der deutschen Rechtsgeschichte 188–191. Compare also Beauchet, Histoire de la propriété foncière en Suède (1904) 424 *et seq.*

principle of forfeiture or of sale. Let us first examine briefly the gage with immediate possession of the creditor and then pass on to the gage with possession of the debtor.

I.

Forms of security on land with immediate possession of the creditor are, then, either usufruct-gage or property-gage; or, indeed, combinations of the two.

Both the usufruct-gage and the property-gage are found in the law of the Anglo-Saxon period;[1] but it is with the law of the centuries succeeding the Norman Conquest that we are here concerned.

The usufruct-gage assumes two forms, the form depending upon the use that is made of the rents and profits taken by the gagee while the land is held by him. The transaction is a *vivum vadium* if the parties agree that the rents and profits shall reduce the debt. The transaction is called a *mortuum vadium* if, on the other hand, the rents and profits do not reduce the debt itself, but are taken in lieu of interest.[2]

Glanvill states positively that the *vivum vadium* is a valid transaction; and apparently he means also that the king's court enforces the terms of the *mortuum vadium*. The Christian creditor, however, commits a sin in entering into a contract of *mortuum vadium* because it is a sort of usury; and if he dies before the contract comes to an end, he dies as a sinner and his chattels are forfeited to the king. To all seeming the *mortuum vadium*, sinful though it be, is the usual contract of the thirteenth century both for Christian and for Jew alike.[3]

From the usufruct-gage proper must be distinguished the so-called "beneficial lease," a lease for years purchased outright for a sum of money. This latter transaction serves in the twelfth and thirteenth centuries two important economic ends: It provides the

---

[1] See Brunner, Zur Rechtsgeschichte der römischen und germanischen Urkunde 194–198; Kohler, Pfandrechtliche Forschungen 95, 96. Compare Lodge, The Anglo-Saxon Land Law, Essays in Anglo-Saxon Law 106, 107.

[2] Glanvill, X. 6, 8. Compare 1 Robbins, Law of Mortgages (1897) 1–5; Fisher, Law of Mortgage (1897) 4–7; 3 Gray, Cases on Property 411, n. 1. The English *vivum vadium* corresponds, therefore, to the German *Todsatzung* and the English *mortuum vadium* to the German *Zinssatzung*.

[3] Glanvill, X. 8; 2 Pollock and Maitland, Hist. Eng. Law (1898) 119. The principle of the *vivum vadium* is found in Madox, Formulare, No. CXLII. Compare Round, Ancient Charters, No. 56.

lessor with ready money, and it provides also a form of investment of capital that enables the lessee to speculate on the return of his money with interest out of the profits of the land. There is here no gage in the sense of a security for some personal claim, because there is no debt. For the same reason there is no usury, and in an age when usury is a sin and when the goods of the usurer who dies in his sins are forfeited to the king, the beneficial lease is popular. The one who invests his money in a beneficial lease has too the termor's possessory protection; and at the end of the term the land goes back to the lessor.[1]

Coke discusses the *vivum vadium* of his day as a form of security where "neither money nor land dieth, or is lost";[2] and in modern law the principle of the usufruct-gage underlies the "Welsh mortgage" and "securities in the nature of Welsh mortgages." In these modern gages the fruits of the land may be taken in lieu of interest only or in reduction of both principal and interest.[3]

The property-gage of the Middle Ages is forfeiture-gage. It assumes two main forms: (1) either the gagee who is given immediate possession must wait until default of the debtor before he can acquire proprietary right; or, (2) the gagee is given proprietary right at once, though under the condition that, if the debt be paid at a certain day, the proprietary right of the gagee shall then come to an end. In either case default of the debtor results in immediate or ultimate forfeiture of the gaged land itself, whatever may be its value, in satisfaction of the debt.

The first of these two varieties of the forfeiture-gage seems to be the usual form in the days of Glanvill and Bracton.

Glanvill, in the tenth book of his treatise, is apparently discussing several forms of gage and combinations of these forms. The usufruct-gage may be *vivum vadium* or *mortuum vadium*; but to such a transaction there may be added the possibility that the land itself be forfeited.

The gage may be given for a term, and in such a case the parties may or may not include a clause of forfeiture in their contract. If they include such a clause, this express bargain must be strictly

---

[1] 2 Pollock and Maitland, Hist. Eng. Law 111, 112, 117, 121, 122. Compare the *Rentenkauf* of the German Middle Ages. 1 Heusler, Institutionen des deutschen Privatrechts 338, 355, 375, 2 *idem* 150–153.

[2] Co. Lit. 205*a*.

[3] See 1 Robbins, Law of Mortgages (1897) 1–31; Pollock, Land Laws (1896) 133.

adhered to; this bargain being that, if at the end of the fixed term the debtor do not pay his debt, the gaged land shall then become at once the property of the creditor, to be disposed of as he wishes.[1] Here no judgment of the court is necessary. By operation of the clause of forfeiture, the gagee becomes suddenly seised in fee, with the freeholder's rights and remedies. On the other hand, the contract may contain no such clause of forfeiture; and here the creditor must go into court and there must be certain legal proceedings before the gaged land can be forfeited to him for the debt. These proceedings are as follows: When the debtor fails to pay at the end of the term, the creditor must sue him. The debtor is then compelled to appear in court in answer to a writ ordering him to "acquit" or redeem the gage. Once in court the debtor will either confess or deny the fact of gaging the land for the debt. If he confess it, he has thus, says Glanvill, confessed the debt itself; and he is ordered by the court to redeem the gage within a "reasonable" time by payment of the debt, the court at the same time declaring that, in case of default in payment at the end of this new period, the gaged thing itself shall become the property of the gagee and thus forfeited for the debt. Should, however, the debtor deny the gage for the debt, he may then acknowledge that the land in question is his property and offer some excuse for its being in the possession of the other party. Should he confess in court that the land is not his property, the creditor is at once allowed by the court to dispose of it as his own. If the debtor assert that the property in question is his own, but deny both the gage and the debt, the creditor must then prove both the debt and the gage of the specific property in dispute for this debt.[2]

If now the gage be given indefinitely or without a term, the creditor may at any time demand the debt. Apparently this means that the creditor can at any time go into court and get a judgment ordering the debtor to redeem within some fixed and reasonable period; the court at the same time declaring that, if the debtor fail to do this, the creditor may do anything he pleases with the gaged land, that is, that the land will on default be forfeited.[3]

---

[1] Glanvill, X. 6. See also 1 Spence, Equitable Jurisdiction (1846) 600, 601; Chaplin, Story of Mortgage Law, 4 HARV L. REV. 8; 2 Pollock and Maitland, Hist. Eng. Law 120.

[2] Glanvill, X. 6–8. On the burden of proof see Chaplin, Story of Mortgage Law, 4 HARV. L. REV. 9.

[3] Glanvill, X. 8; 2 Pollock and Maitland, Hist. Eng. Law 120. On the equitable nature of certain features of this procedure in the king's court and their similarity to

Unless, therefore, the parties stipulate that the gage shall be a pure usufruct-gage, we see that, whether the gage be for a term or without a term, and whether the contract contain the forfeiture clause or not, the gaged land may be forfeited for the debt; the gage thus assuming the form of property-gage.

The possession of the gagee is called *seisina*, a *seisina ut de vadio*, but it is quite unprotected by any legal remedy. The gagor remains seised of his freehold, and, should some third person unjustly turn the gagee out of the land, it is the gagor who has the right to bring the possessory action of Novel Disseisin. The gagor, not the gagee, has indeed been disseised. Furthermore, if the gagor himself eject the gagee, the latter still has no remedy by which he can recover possession.[1]

Glanvill explains this by saying that what the creditor really has a right to is not the land, but the debt itself; and that, if ejected by the gagor, the gagee should bring an action of Debt, the court compelling the debtor to make satisfaction. This argument is, however, unsatisfactory; and the real reason why the gagee is not given possessory protection is to be sought elsewhere. As pointed out by Pollock and Maitland, the king's justices in the time of Glanvill are experimenting with the new possessory actions. They are agreed that the freeholder shall have the assize of Novel Disseisin; but they are not quite sure whether the gagee really and truly has a *seisina* that calls for protection. Influenced perhaps by theories of the Italian glossators as to possessory protection, they end in refusing the gagee a remedy.[2]

As soon as the debt be discharged or payment properly tendered, the gagee is under the duty of giving up possession to the gagor; and, should the gagee maliciously retain possession, the gagor may summon him into court by writ. If it be determined that the land is held as a gage and not in fee, it must be given up to the gagor.[3]

The creditor may enforce his personal claim by bringing the

---

the "equity of redemption" and "decree of foreclosure" in the courts of equity at a later day, see Chaplin, Story of Mortgage Law, 4 HARV. L. REV. 9, 10; 2 Pollock and Maitland, Hist. Eng. Law 120.

[1] Glanvill, X. 11, XIII. 28, 29; 2 Pollock and Maitland, Hist. Eng. Law 120, 121. See further Chaplin, Story of Mortgage Law, 4 HARV. L. REV. 6, 7.

[2] Glanvill, X. 11; 2 Pollock and Maitland, Hist. Eng. Law 120, 121. See Bracton, f. 268.

[3] Glanvill, X. 6, 8–10, XIII. 26–30.

action of Debt. His right to the gage on default may be enforced by the foreclosure procedure we have just discussed.[1]

To all seeming the Glanvillian gage soon becomes obsolete owing to the failure of the king's court to protect the gagee's *seisina ut de vadio;* and indeed the attempt to treat the gagee's rights in the land as rights of a peculiar nature is soon given up, the gagee being now given some place among the tenants.[2]

In the age of Bracton the popular form of gage is a lease for years to the creditor, under the condition that, if the debt be not paid at the end of the term, the creditor shall hold the land in fee. During the term the gagee has the *possessio* or *seisina* of a termor, and this possession is protected by writ. On default of the debtor the fee shifts at once and without process of law to the creditor; the fee, the land itself, is thus forfeited for the debt.[3] Here we have a form of the property-gage very much like the Glanvillian gage for a term with clause of forfeiture; and indeed the chief difference is the protection thrown about the creditor's possession in the later form.

This early form of the property-gage, the gage of Glanvill and Bracton, is not, however, to be the basis of the later law. Legal theory of later times does not tolerate this thirteenth-century method of allowing a term for years, a "chattel real," to grow into a "freehold estate" on the mere fulfilment of a condition.[4] Indeed, the classical gage of English law is not a conveyance on condition precedent, but a conveyance on condition subsequent, the *mortuum vadium* or *mortgage* that is expounded by Littleton and the judges of the later common law.

This later form of gage is a conditional feoffment; the condition being one for redemption and defeasance on a specified day. The creditor acquires at once an estate in fee, though this freehold estate is subject to the condition. If the debt be paid on the day, the feoffor, that is, the debtor, or his heirs may re-enter; if not, the freehold estate of the feoffee, the creditor, is entirely freed

---

[1] Glanvill, X. 6–8, 11, 12.

[2] 2 Pollock and Maitland, Hist. Eng. Law 120, 121.

[3] Bracton, f. 20, 268, 269; 3 Britton XV, §§ 2–7; Bracton's Note Book, pl. 889; Madox, Formulare, No. DIX; Cart. Guisborough 144; 2 Pollock and Maitland, Hist. Eng. Law 122. See also Round, Ancient Charters, No. 56; 1 Chron. de Melsa 303; Madox, Formulare, No. CCIII; Y. B. 21–22 Ed. I. pp. 125, 222–224.

[4] See Littleton, §§ 349, 350; Co. Lit. 216–218; 2 Pollock and Maitland, Hist. Eng. Law 122, 123.

from the condition, thereby becoming absolute.[1] In other words, the gage of the later common law is a property-gage, a form of forfeiture-gage; and at the same time there is combined with this forfeiture-gage a temporary usufruct-gage in the nature of the Glanvillian *mortuum vadium*, the rents and profits taken by the mortgagee in possession until the day of payment not going in reduction of the debt.[2]

Though the writers of the twelfth and thirteenth centuries do not discuss this form of the property-gage, probably because it falls under the general theory of conditional gifts, it is nevertheless found in the sources of the law long before the time of Littleton,[3] and its history seems indeed to reach back to a distant past.[4] Its transformation in modern times will be adverted to subsequently.

Harold D. Hazeltine.

BERLIN, March 29, 1904.

[*To be continued.*]

---

[1] See Bracton's Note Book, pl. 458; Y. B. 20–21 Ed. I. p. 422; Y. B. 30–31 Ed. I. pp. 208–212; Madox, Formulare, Nos. DLX–DLXII, DLXIX, DLXXIX; Littleton, §§ 332–344. According to modern practice in England the mortgage takes the form of an absolute conveyance to the mortgagee, with an agreement on his part to reconvey when the loan is paid. See Ames, Specific Performance, 17 HARV. L. REV. 174.

An example of the mortgage for years will be found in Madox, Formulare, No. DLXXXIX. In this later form of gage for a term default results, not in forfeiture of the fee, as in the time of Bracton, but simply in forfeiture of the term. See note (1) to Co. Lit. 205 a.

[2] Franken, Französisches Pfandrecht 162, 163.

[3] See the authorities cited in note 1, *supra*.

[4] On a similar form of conditional conveyance for purposes of security in the Anglo-Saxon period see Brunner, Zur Rechtsgeschichte der römischen und germanischen Urkunde 194–198.